APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL SANTO POLIZZI, *Defendant-Appellant.*	No. 72-2983
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JACK S. SHAPIRO, *Defendant-Appellant.*	No. 72-2984
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PETER JAMES BELLANCA, *Defendant-Appellant.*	No. 72-2985
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY GIARDANO, *Defendant-Appellant.*	No. 72-2986
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARTHUR J. ROOKS, *Defendant-Appellant.*	No. 72-2987
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*	No. 72-2988
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EMPRISE CORPORATION, a New York Corporation, *Defendant-Appellant.*	No. 72-2989
	OPINION

[April 30, 1974]

Appeal from the United States District Court
for the Central District of California

Los Angeles witnesses and added a number from Las Vegas. The defense renewed its motion for change of venue, this time pressing for transfer to Las Vegas. It appeared, however, that the condition of the criminal docket in Las Vegas was such that a reasonably speedy trial could not be obtained, whereas trial in Los Angeles was imminent. The trial court denied the renewed motion both on this ground and because the witnesses then expected to be called resided throughout the country.

This was not an abuse of discretion. It is proper to require a greater showing of inconvenience when a change of venue is sought late in proceedings.[10] As the trial court observed, there was no "ideal place for the holding of this trial." Wherever the trial was held, both sides would bear significant transportation and lodging expenses. Moreover, most of the Las Vegas witnesses were government witnesses; since the government appeared willing to pay the expense of transporting them, it is hard to see how defendants would be more inconvenieced by trial in Los Angeles than in Las Vegas. The improbability of a speedy trial in Las Vegas was a factor entitled to great weight, especially since one defendant had already moved for dismissal on speedy trial grounds.

The motion for change of venue was renewed a third time, after yet another set of witness lists was filed. The trial judge reiterated his belief that only compelling reasons could justify transfer when trial was imminent. For the reasons stated, this final denial was not an abuse of discretion.

XIII. *Giordano's Severance Motions*

Appellant Giordano complains that the trial court abused its discretion in denying his motions for severance under Rule 14, Federal Rules of Criminal Procedure, submitted both before and during trial.

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[10]Rule 22, Fed. R. Crim. Pr., provides that "[a] motion to transfer under these rules may be made at or before arraignment or at such other times as the court or these rules may prescribe," suggesting that the court may decline to entertain a late motion. *See* United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965); Cagnina v. United States, 223 F.2d 149, 154 (5th Cir. 1955). Here, there has been a change in the situation since the initial venue decision. Nonetheless, to avoid the obvious opportunity for abuse it was proper to require a greater showing of inconvenience when trial was imminent.

Denial of Giordano's pretrial severance motion was clearly correct. Although Giordano was indicted on only one count, that count charged conspiracy. For obvious reasons, a joint trial is particularly appropriate where conspiracy is charged. *Davenport v. United States*, 260 F.2d 591, 594 (9th Cir. 1958). *See* American Bar Association, Standards Related to Joinder and Severance 39 (Approved Draft 1968).

The government represented that Giordano was among the "leaders" in the unlawful scheme and furnished the court with a summary of the evidence it expected to offer linking Giordano to the conspiracy. Moreover, the government stated that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct. On this record the advantages and economy of a joint trial clearly outweighed the remote possibility of unwarranted prejudice. *See United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971).

The balance may not have been so clear when Giordano moved for severance during trial. Although there is no suggestion of bad faith, the evidence against Giordano did not entirely justify government counsel's optimistic forecast. Nonetheless, there was sufficient evidence other than acts and statements of co-conspirators to show that Giordano participated in the conspiracy. Since this is so, it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of the other defendants pursuant to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone.[11] *United*

[11]Giordano stresses the fact that a very small proportion of the trial transcript relates directly to him; the government engages in elaborate analyses which, it claims, show that Giordano was not as peripheral to the proceedings as he claims. We do not consider, however, that the exact quantity of evidence relating to a conspiracy defendant personally is important in determining whether severance should have been granted. Although there are some cases which take this factor into account (*see* United States v. Branker, 395 F.2d 881, 888 (2d Cir. 1968); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971)), they concern defendants against whom conspiracy charges were dismissed during trial. Dismissal of a conspiracy charge does not mean that severance is required. Schaffer v. United States, 362 U.S. 511, 516 (1960). It does, however, shift the balance of factors to be considered, *see Schaffer, supra*; a separate trial would not entail a replay of the joint conspiracy trial, and

States v. Kenny, 462 F.2d 1205, 1218 (3d Cir. 1972); *see also United States v. Roselli*, 432 F.2d 879, 901 (9th Cir. 1970). Moreover, as the government asserted, all or substantially all such evidence probably would have been introduced in a separate trial. It is possible that the government might have considered the time and effort required for a separate trial too great a price to pay for the conviction of Giordano alone, but loss of that possibility hardly demonstrates that Giordano was "prejudiced by a joinder" within the meaning of Rule 14.

The trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him. Twice during voir dire the court admonished the jury that each defendant—naming them, including Giordano—was entitled to be judged as an individual. No less than six times during instructions to the jury the court stressed the importance of separate determinations of each defendant's guilt or innocence on the basis of the evidence pertaining to the particular defendant. Several times the court warned that association with participants in a conspiracy does not prove that a defendant was a member of the conspiracy. This jury's ability and determination to make discriminating judgments is evidenced by the fact that it did not convict one of the most active participants in the conspiracy, defendant Polizzi, on one of the nine substantive counts on which he was charged. Obviously, this jury did not render a mass judgment. *United States v. Berlin*, 472 F.2d 13, 15 (9th Cir. 1973). There may be cases in which even careful jury instructions cannot cure the possibility of prejudice by association inherent in conspiracy trials,[12] but this was not one of them.

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much of the evidence admitted in the joint trial could not be considered against the defendant no longer charged with conspiracy. In the instant case, most of the evidence not directed to Giordano personally was nonetheless admissible against him, so that the proportion of personally oriented evidence is not important.

[12] *See* Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). *But see* United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971); United States v. Patterson, 455 F.2d 264, 266-67 (9th Cir. 1971); United States v. Roselli, 432 F.2d 879, 902 (9th Cir. 1970), all holding that careful jury instructions can be sufficient to guard against this kind of possible prejudice from joinder.

Giving due recognition to the somewhat stricter showing required to justify severance when the trial has been partially or wholly completed,[13] we conclude that Giordano's motions for severance during trial were properly denied.

XIV *Giordano's Requested Instruction*

Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government drew implications from this testimony adverse to Giordano.

Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. *See United States v. Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was proper, that the jury was not entitled to consider *all* of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants—evidence offered by one may support the conviction of the others. *See Rickey v. United States*, 242 F.2d 583, 586 (5th Cir. 1957); *Maupin v. United States*, 225 F.2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. *Brown v. United States*, 56 F.2d 997, 999-1000 (9th Cir. 1932).[14]

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[13]ABA, *Standards Relating to Joinder and Severance* 33 (Approved Draft 1968).

[14]Giordano cites one instance in which the instruction he requests was given, United States v. Schneiderman, 106 F. Supp. 906, 928 (S.D. Calif. 1952), but there was no discussion in *Schneiderman* of the issue. *See also* United States v. Interstate Engineering Corp., 288 F. Supp. 402, 413-14 (D. N.H. 1967); Devitt & Blackmar, Federal Jury Instructions § 10.06 (1970). *But see* United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970), supporting the *Brown* holding by necessary implication.

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. "Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes v. United States*, 169 F.2d 739, 744 (4th Cir. 1948). *See* ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced.

As we emphasized in *Brown*, a defendant who rests his case may nonetheless cross-examine or introduce evidence to impeach or contradict a co-defendant who testifies thereafter. *See also United States v. Zambrano*, 421 F.2d 761, 763 (3d Cir. 1970). In the present case, as in *Brown*, there was no request to cross-examine the co-defendants or to admit rebuttal evidence. It is even clearer here than in *Brown* that "if such request had been made, it would have been granted," 56 F.2d 1000, since the trial judge asked Giordano's attorney after each defense witness whether he had any questions to ask by way of cross-examination.[15]

XV *Sufficiency of the Evidence—Giordano*

We consider Giordano's contention that the evidence was insufficient as to him separately from the same contention as to other defendants. The case against Giordano was the weakest; and,

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[15]Because Giordano neither cross-examined his co-defendants nor offered rebuttal evidence, we are not faced, either here or in the next section of this opinion dealing with Giordano's motion for acquittal, with the problem presented in Cephus v. United States, 324 F.2d 893, 897-98 (D.C. Cir. 1963). In *Cephus*, the issue was whether a defendant waives his right to test the government's case-in-chief on appeal if he offers evidence only to counter a co-defendant's incriminating evidence; the Court of Appeals for the District of Columbia held that there is no waiver. This court has never squarely accepted or rejected the Cephus rule. *See* United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972); Verdugo v. United States, 402 F.2d 599, 604 n.4 (9th Cir. 1968).

unlike other defendants, Giordano did not waive his right to review of the motion to acquit made at the close of the government's case. For the latter reason, we consider only the evidence produced against Giordano in the prosecution's case-in-chief.

As Giordano points out, the government offered no direct evidence of his participation in the conspiracy.[16] But "circumstantial evidence is not inherently less probative than direct evidence," *United States v. Nelson*, 419 F.2d 1237, 1239 (9th Cir. 1969), and, in many conspiracy cases, is the only kind of evidence available. *White v. United States*, 394 F.2d 49, 51 (9th Cir. 1968). Thus, denial of the motion to acquit is subject to the same standard on review as it would be if there were direct evidence of guilt: whether "jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion" that Giordano participated in the conspiracy. *United States v. Nelson*, *supra*, 419 F.2d at 1245.

The government's theory was that at Zerilli's solicitation Giordano arranged for the investment of $150,000 in VFI when the enterprise was in critical need of funds; that the investment was made through Sansone, a St. Louis real estate investor and bank director, acting as a "front"; and that following the investment Giordano participated at various critical stages in the illegal enterprise.

Some of the government's circumstantial evidence is described briefly in the margin.[17] Possibly the series of events disclosed

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[16]Friedman, a co-conspirator who testified for the government, and Feil, another witness who testified directly to the illegal involvement of some defendants, offered no evidence implicating Giordano; none of the four government witnesses who might, on the prosecution's theory, have known of Giordano's involvement in the conspiracy, directly implicated him.

[17]Giordano and Zerilli were close friends. Giordano lived in St. Louis, Zerilli in Detroit. There were telephone calls between Giordano's home and office and Zerilli's, as well as other calls charged to Zerilli's credit card and placed to Giordano's numbers, at various key times in the course of events between June and November, 1967. Giordano knew the Cusumanos and the Sansones in St. Louis. The Sansones did not know Zerilli.

The need for additional money, which resulted in the issuance of the Class C debentures Sansone later bought, developed in early June. There

by the evidence could be explained as coincidence, or as normal contacts among friends. On the other hand, "[t]he jury un-

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were calls between telephones listed to Giordano and Zerilli at that time. Zerilli came to St. Louis for two days on June 8.

The Sansones began gathering money for their VFI investment after Zerilli visited St. Louis, but before the Class C debentures in which they invested were officially issued. They could have learned about the investment possibility only from a person having knowledge of the inner operations of VFI.

In early August, Giordano repaid an overdue loan to the Cusumano family trust. Less than three weeks later, Sansone took out a loan from the same trust. This loan was part of the money Sansone eventually invested in VFI. The Sansone loan was the only business transaction ever consummated between Sansone and the Cusumano family. It was unsecured. Although the VFI debentures in which Sansone invested yielded 4% interest, the loan from Cusumano was at 7%, an anomaly for which Sansone had no convincing explanation.

The Sansone investment was withdrawn less than 60 days after it was made, after Sansone was told by the Nevada Gaming Commission that he would have to apply for a gaming license, disclose the source of the invested funds, and provide fingerprints. Sansone testified that he withdrew only because, "I never anticipated that I would have to be classified as a gambler when I bought the debenture." But from the outset the Sansones admittedly knew they were investing in a gambling casino.

Giordano made five trips to Las Vegas between July and November 1967. The Giordanos have no business interests or relatives in Las Vegas, and Giordano was not a gambler. Each of these trips was closely preceded, or followed, or both, by telephone contact between Giordano telephones and Zerilli telephones or phone calls charged to Zerilli. Each trip coincided with an important event in the unlawful scheme. For example, trips in September and November coincided with the beginning and end of the $150,000 investment.

On September 12 there was a series of phone calls between Zerilli's home and Giordano's home and business. The next day, Sansone marshaled the entire $150,000. On that same day there was a call from a Zerilli telephone to Giordano's telephone. On September 14 Sansone flew to Las Vegas with the money to make the investment. He checked into the Frontier Hotel. Sixteen minutes later, Giordano checked into the Dunes Hotel. Four days later, Sansone deposited the $150,000 in VFI's account, received the debentures, and left Las Vegas. Giordano departed the following day. In November, a telephone call to Giordano was charged to Zerilli on the same day the Nevada Gaming Commission's letter was sent to Sansone. Giordano went to Las Vegas on November 9; Zerilli arrived and checked into the Frontier Hotel under an assumed name on November 10; and Sansone arrived on November 11 to complete the withdrawal of the $150,000 investment.

doubtedly could have found these events too interlocked to constitute coincidence" (*United States v. White, supra,* 394 F.2d at 53); it could have drawn from the events the inferences suggested by the prosecution—that Giordano was brought into the conspiracy at least as early as June; that he arranged for the investment of $150,000 in VFI through Sansone; and that the purpose of Giordano's five trips to Las Vegas in 1967 was to watch over this hidden interest in VFI and participate in various key decisions. There comes a point when the innocent explanation is so much less likely than the culpable one that jurors properly could decide that a defendant in fact was acting in furtherance of the conspiracy and shared its illegal purpose. We believe that point was reached here as to Giordano.

Three legal arguments subsidiary to Giordano's challenge to the sufficiency of the evidence should be mentioned.

1. The government called Cusumano and Sansone as witnesses. Both denied that Giordano was involved in a Cusumano loan to Sansone. Giordano argues that the government is bound by this testimony. But the notion that a party is bound by the testimony of every witness it calls is "long discredited," *Rodgers v. United States,* 402 F.2d 830, 833 (9th Cir. 1968), and is clearly not the law of this circuit. *See* cases cited in *Rodgers,* 402 F.2d at 833, n. 1.

Rodgers does hold that the government cannot rely on an inference when the *only* evidence presented by the government is inconsistent with the inference the government wishes drawn. However, *Rodgers* itself acknowledges that this does not "mean that in every case where some of the government's evidence is arguably contrary to an inference that it wishes to have the jury draw from other evidence, the inference may not be drawn." 402 F.2d at 834. *See also United States v. Payne,* 467 F.2d 828, 831 (5th Cir. 1972). Further, in *Rodgers* the evidence inconsistent with the desired inference was presented by a disinterested witness and was embodied in an uncontested document. Here, Cusumano and Sansone were interested witnesses with motives to dissemble about Giordano's role, and the prosecution presented a great deal of other evidence, albeit circumstantial, connecting Giordano with the loan. It may be reasonable to require the prosecution to do more than rely on a general inference to

counteract its own uncontested documentary evidence, but an inference specifically supported by other evidence is not barred simply because it is inconsistent with testimony of witnesses who were called by the government but have every reason to protect the defense.

2. Giordano argues that telephone company records showing calls between telephone numbers assigned to Giordano and Zerilli were inadmissible because there was no direct evidence as to who participated or what was said, citing *Laughlin v. United States*, 226 F. Supp. 112, 113 (D.D.C. 1964). But this case held only that such records were insufficient corroboration in a perjury case, where "direct and positive evidence of falsity of defendant's sworn statement" is required, and "circumstantial evidence thereof is insufficient, no matter how persuasive." 226 F. Supp. at 114. The Court of Appeals held such records admissible in a conspiracy case, distinguishing the district court's ruling in the earlier perjury case because of the high degree of corroboration necessary in a perjury case. *Laughlin v. United States*, 385 F.2d 287, 293 (D.C. Cir. 1967).[18]

Giordano also contends the government cannot rely upon inference to establish the contents of the telephone calls, citing *Osborne v. United States*, 371 F.2d 913, 927-29 (9th Cir. 1967). But in *Osborne*, each telephone call was the subject of a separate count charging a separate violation of 18 U.S.C. §1343, "Fraud by wire, radio, or television." Proof of the contents of the particular telephone call was therefore crucial to conviction on the particular count. In the present case, the exact content of each telephone call is not crucial to conviction; the telephone calls themselves are not the subject of the charge. Proof of their occurrence, especially their timing and frequency, is merely circumstantial evidence tending, with other circumstantial evidence, to show Giordano's participation in the conspiracy.

3. Giordano makes the same contention with respect to proof regarding his trips to Las Vegas—that no inference can be drawn from the fact that they occurred—and we reject it for the same reasons. He also argues that hotel records evidencing his stays at

[18]In the conspiracy case, there was evidence identifying the parties to the telephone calls (*see* 385 F.2d at 293), but the Court of Appeals did not rest admissibility upon this circumstance.

the Dunes Hotel in Las Vegas in 1967 should not have been admitted because other contemporaneous hotel records were destroyed "in accordance with routine hotel policy" prior to the return of the indictment in 1971. The argument is that if the indictment had been returned earlier the records might have been in existence and might have contained exculpatory or explanatory evidence demonstrating that Giordano's visit had an innocent purpose. Giordano cites *United States v. Marion*, 404 U.S. 307 (1971).

The contention is frivolous. The Sixth Amendment does not apply to pre-indictment delay, 404 U.S. at 313, and Giordano has not shown that the delay involved here violated the Due Process Clause. 404 U.S. at 324-26. We need not consider, therefore, whether suppression of evidence would be a proper remedy if a due process violation had occurred. *Cf. Strunk v. United States*, 412 U.S. 434 (1973).

DUNIWAY, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Browning.

XVI. *Criminal Liability of Emprise Corporation.*

Appellant Emprise Corporation argues that it is not liable for any criminal acts committed by its predecessor in interest. The facts are these: Before March 1, 1970, there was a New York corporation called High Park Corporation, which owned all of the shares of another New York corporation, Emprise Corporation (Old Emprise). On March 1, 1970, Old Emprise merged into its parent, High Park Corporation. On March 17, 1970, High Park Corporation amended its corporate name to Emprise Corporation (New Emprise).

The February 26, 1971, indictment in this case charged "Emprise Corporation" as a defendant. In July, 1971, it became clear that this meant Old Emprise, and, on September 9, 1971, the district court dismissed as to Old Emprise for want of personal jurisdiction over it. The government filed an information against New Emprise. New Emprise moved to dismiss, but this motion was denied, and New Emprise was convicted of violating 18 U.S.C. §§371 and 1952 and was fined $10,000. The charged offense was committed by Old Emprise, before the merger.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Anthony Giardano, Arthur J. Rooks, Anthony Joseph Zerilli, Emprise Corporation, a New York Corporation, Defendants-Appellants.	No. 72-2983, 72-2984, 72-2985, 72-2986, 72-2987, 72-2988, 72-2989 DC = 7574 DWW

JUDGMENT

Appeal from the United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered April 30, 1974

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL SANTO POLIZZI, *Defendant-Appellant.*	No. 72-2983
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JACK S. SHAPIRO, *Defendant-Appellant.*	No. 72-2984
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PETER JAMES BELLANCA, *Defendant-Appellant.*	No. 72-2985
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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*	No. 72-2988
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EMPRISE CORPORATION, a New York corporation, *Defendant-Appellant.*	No. 72-2989 ORDER

[July 18, 1974]
[July 25, 1974]*

* Per Order of Court of Appeals dated August 5, 1974, the date of entry of this Order was corrected to July 25, 1974.

Before: BROWNING and DUNIWAY, Circuit Judges, and **RENFREW, District Judge

The opinion filed April 30, 1974, is modified as follows:

Slip Opinion, page 3, third line from bottom:

Change line to read: "lant Giordano's* motion for severance." Add the following footnote: " *In the indictment, appellant's name was spelled Giardano. His true name is Giordano."

Slip Opinion, page 16, lines 14-16:

Change lines to read: "at 492. That phrase does not require specific intent to violate state law, but rather specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its inconsistency with the literal".

Slip Opinion, page 35, last line, to page 36, line 6:

Delete the third and fourth sentences of the paragraph and footnote 57 on page 36 and substitute the following: "There was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied."

Slip Opinion, page 36, seventh line from bottom, to page 37, line 20:

Delete the last four sentences of the paragraph beginning on page 36 and the first two full paragraphs and footnote 58 on page 37, and substitute the following:

For all that the jury knew from Polizzi's direct testimony, his "problem" could have been one of short duration—e.g., insufficient financing—which would not have indefinitely precluded licensing. If so, there would have been no motive for furtive investment. Thus, the nature of Polizzi's "problem" was clearly relevant. And while the trial judge did order Polizzi to answer the question regarding the "problem" he did not order the defendant to use the word "Mafia." Pollizi

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**Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

could have answered the question truthfully and specifically without using the "Mafia" term—for example, he could have said that he understood that he would not be considered a suitable person for a license.

Thus, since the general nature of Polizzi's problem was directly relevant and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice.

This result is even clearer as to Zerilli. The reason why Zerilli could not be licensed was not admissible merely to impeach Zerilli or his attorney—it was directly relevant to Zerilli's guilt. If the reason Zerilli could not be licensed was, as he testified, his ownership interest in a race track, then his testimony of continuing interest in the enterprise because of an intention to invest later might be credible. The race track regulation was apparently unclear and Zerilli could in any event sell his race track interest. However, if the reason he could not be licensed was his reputation, then any hope of investing later would be doubtful since his reputation was unlikely to change. Zerilli therefore had a strong motive to make his investment surreptitiously. Moreover, there was no mention of the Mafia in connection with Zerilli, only of his "reputation," so that the court did not err in permitting the government to cross-examine Zerilli on the reasons why he could not be licensed.

Slip Opinion, page 49, lines 8-10:

Delete the second sentence of the paragraph and footnote 77.

Slip Opinion, page 50, line 1:

Delete the reference to footnote 78 and the footnote.

Slip Opinion, page 71, lines 6-8:

Delete the first sentence of the paragraph and substitute the following: "Between 1962 and 1965, the government conducted electronics surveillance against appellants Zerilli, Polizzi and Giordano."

Slip Opinion, page 74, line 12:

Change citation to read: *Walder v. United States*, 1954, 347 U.S. 62, 65.

Slip Opinion, page 78, lines 14-17:

Delete the entire paragraph.

Slip Opinion, pages 37-50:

Change footnote 59 to 57 and renumber the following footnotes to reflect the deletion of present footnotes 57, 58, 77 and 78.

The panel as constituted in the above cases has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

Dated: July 18, 1974